

FILED
Oct 12, 2016
Court of Appeals
Division III
State of Washington

No. 32961-5-III

IN THE COURT OF APPEALS DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

JOEL GROVES, Appellant

SECOND SUPPLEMENTAL BRIEF OF APPELLANT

Marie J. Trombley,
WSBA 41410
PO Box 829
Graham, WA
253-445-7920

TABLE OF CONTENTS

I. ISSUES REQUESTED TO BE BRIEF **1**

II. STATEMENT OF FACTS **1**

III. ARGUMENT **9**

 A. The State Delayed Producing Exculpatory Dna Evidence In
 Violation Of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10
 L.Ed.215 (1963)..... **9**

 B. The Search At The Ellington Home Was Not Supported By
 Probable Cause and Counsel Was Ineffective For Failing To
 Raise The Issue At The Trial Court. **12**

 C. Mr. Groves Did Not Knowingly, Voluntarily, and Intelligently
 Waive His Privilege Against Self-Incrimination..... **18**

IV. CONCLUSION..... **21**

TABLE OF AUTHORITIES

Washington Cases

<i>State v. Bebb</i> , 108 Wn.2d 515, 740 P.2d 829 (1987).	9
<i>State v. Chamberlain</i> 161 Wn.2d 30, 162 P.3d 389 (2007)	14
<i>State v. Contreras</i> , 92 Wn.App. 307, 966 P.2d 915 (1998)	13
<i>State v. Davila</i> , 184 Wn.2d 55, 357 P.3d 636 (2015)	10
<i>State v. Eisfeldt</i> , 163 Wn.2d 628, 185 P.3d 580 (2008)	13
<i>State v. Humphries</i> , 181 Wn.2d 708, 336 P.3d 1121 (2014)	20
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007)	12
<i>State v. Mayer</i> , 184 Wn.2d 548, 362 P.3d 745 (2015)	20
<i>State v. Meckelson</i> , 133 Wn.App. 431, 135 P.3d 991 (2006)	17
<i>State v. Mierz</i> , 17 Wn.2d 460, 901 P.2d 286 (1995)	16
<i>State v. Mullen</i> , 171 Wn.2d 881, 259 P.3d 158 (2011)	10
<i>State v. Neth</i> , 165 Wn.2d 177, 196 P.2d 177 (2008)	14
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004)	17
<i>State v. Thein</i> , 138 Wn.2d 133, 977 P.2d 582 (1999)	13
<i>State v. Vannoy</i> , 25 Wn.App. 464, 610 P.2d 380 (1980)	18
<i>State v. Vickers</i> , 148 Wn.2d 91, 59 P.3d 58 (2002)	15
<i>State v. Walters</i> , 162 Wn.App. 74, 255 P.3d 835 (2011)	17
<i>State v. Wittenbarger</i> , 124 Wn.2d 467, 880 P.2d 517 (1994)	9
<i>State v. Worth</i> , 37 Wn.App. 889, 683 P.2d 622 (1984)	14

U.S. Supreme Court

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.215 (1963) _____ 9

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) _____ 19

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) _____ 16

Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) _____ 10

Constitutional Provisions

U.S. Const. Amend. IV _____ 13

U.S. Const. amend. VI _____ 16

Wash. Const. Art. I, §7 _____ 13

Wash. Const. Art. 1, §22 _____ 16

Rules

RAP 2.5(a)(3) _____ 12

I. ISSUES REQUESTED TO BE BRIEF

A. Whether the State delayed producing exculpatory DNA evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.215 (1963): SAG 1 to 11.

B. Whether the search of the 2407 N. Ellington Street house on July 9, 2014 was constitutional, and whether Mr. Groves preserved this issue for review. See SAG at 27-28. The record indicates the search was conducted pursuant to a warrant, but the record does not appear to contain a copy of the warrant.

C. Whether any of Mr. Groves' statements to Officer Jennifer Katzer or Detective Cameron Clasen were admitted at trial, and if so, whether these statements were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). See SAG at 30-31.

II. STATEMENT OF FACTS

This Court directed the parties to file supplemental briefing addressing the above issues. Mr. Groves incorporates the facts presented in the appellant's opening brief and adds the following.

1. DNA Evidence Procedural Facts

Amy Jagmin, a DNA scientist of the Washington State Patrol Crime Lab, was assigned on September 9, 2014 to process a Ruger Blackhawk revolver that was alleged to have been fired by Mr. Groves. 4B RP 966;983-84. The gun was found in a garbage bin at Zack Koback's home on August 11, 2014. CP 198-199.

On October 13, 2014, the prosecuting attorney told the court there was outstanding discovery, most significantly, fingerprint and DNA analysis on the Ruger. 1RP 34-35.

On October 31, the prosecutor told the court:

There was a weapon that was recovered in this case that we tested for fingerprints and – tested for DNA. The DNA crime lab is -- Mr. Groves trial is set for Tuesday. We're trying to get it as quickly as possible. And they've indicated to us this week that if they have a sample of Mr. Groves' DNA as opposed to having to run it through CODIS it will be – yield quicker results. And we're expecting trial next week.
1RP 114; CP 194.

The prosecutor asked the court for an order granting the state a buccal swab. 1RP 114. Defense counsel told the court that Mr. Groves' DNA was already on record and he objected to introduction of new evidence so close to trial. 1RP 115. In response, the prosecutor said defense was aware the state was seeking DNA from the gun and “we were of the understanding that

we could run it through CODIS and that would be fine.” 1RP 116.

The court signed the order for a swab to be taken from Mr. Groves.

1RP 117.

On November 3, the state told the court there was a testable DNA sample on the hammer of the recovered weapon and:

“it may have hit in CODIS on the defendant’s DNA, but they asked for that buccal swab...they are going to use the reference sample to be able to come to a conclusion...”

1RP 132

Four days later, on November 7, the prosecutor told the court:

“---**we knew Mr. Groves’ DNA was in CODIS.** And so originally we thought that was going to be fine. I reached out to DNA and they said, she said, ‘Listen, I can expedite this if I have a reference sample; it’s actually going to be a lot quicker. Can you get me a reference sample of the defendant’s DNA?’”

1RP 174. (Emphasis added).

However, in the lab report dated November 5, 2014, Jagmin

reported:

“The major profile from the hammer of the revolver (QQ) was uploaded to and searched against the state level of the **Combined DNA Index System, (CODIS) database**, and **no probative matches resulted.** The profile will be searched against the national level of the CODIS database at a future date. **If any probative matches occur, an additional report will be provided.**”

Exh. 2 p. 2 (Emphasis added).

At that same hearing, defense counsel argued for suppression of the gun because of the late production of the DNA evidence. The defense did not have time to independently evaluate the DNA findings within the speedy trial period. CP 196; 1RP 157.

Counsel was likewise concerned that the report stated there was a mixture of DNA found on the hammer of the gun, came from *at least* two people. Mr. Groves DNA was allegedly one of the profiles. 1RP 170. The contributors to the DNA profiles found on the trigger and the grip were never identified. 4B 992. The other contributors to the DNA on the hammer were also not identified. 4B 1000. With respect to Mr. Groves' alleged profile on the hammer, Jagmin later testified it was very unusual to get such a robust sample of handler DNA from a firearm. 4B RP 999-1000.

The court denied suppression of the weapon and directed the state to allow defense counsel full and complete access to both the report and the analyst. 1RP 171.

2. Search Warrant

On July 9, 2014, Detective Tim Weed sought a telephonic search warrant for a residence in Ellensburg, where he believed Mr. Groves resided. Exh. 503 p.2-6. In his affidavit, Weed wrote:

On June 14, 2014, Officer Caillier attempted to contact Groves at 2407 Ellington St, referenced an arrest warrant for Groves. Officer Caillier states in his report that he knocked on the door and Groves answered the door.

Based on the above information, including the listed reports, I have reason to believe that Groves resides at 2407 N. Ellington St. Ellensburg WA 98926. I also believe the listed items will be present at that location and respectfully request permission to search the residence of 2407 N. Ellington St., Ellensburg, WA 98926.

Exh. 503 p. 4.

Judge Ellis authorized a search and seizure of evidence material to the investigation at that address: all handguns, ammunition, cellular phones, and documents showing dominion and control over the residence. Exh. 503 p.1. Officers did not find any guns at the home. They found mail addressed to Mr. Groves, however, the mailing address was not the same as the address of the residence being searched. 4B RP1044-1045. They found casings for a .357, but no live rounds. 4B RP 1043-44;1051. They searched a locked safe and located two bullet holsters that held .357 caliber bullets. 4B RP 1041.

Prior to trial, defense counsel brought a motion in limine to preclude the State from asserting the home on Ellington was Mr. Groves' last known address. CP 277. He also sought to limit the State from saying, absent proof, that the safe in the room belonged

to Mr. Groves. CP 277. Counsel did not challenge the probable cause for issuance of the search warrant. 2RP 249.

After the officers testified at trial, defense counsel brought an oral motion to suppress the contents of the locked safe. 6A RP 1392-93. Counsel stated that prior to hearing the testimony he had not realized they searched a locked safe found in the room. 6A RP 1392-93. Counsel wanted Detective Weed to return to the stand to authenticate the search warrant and have it admitted to establish it did not authorize a search of locked containers. 6A RP 1394.

The court ruled that a 3.6 motion, after the testimony had been admitted, was untimely. 6A RP 1394. The court denied inquiry into whether the warrant authorized opening locked containers, as it was a legal issue for the court and not a factual issue for the jury. 6A RP 1395.

3. Statements

Mr. Groves was arrested and transported to the Ellensburg Police Department on July 11, 2014. 1RP 57; 4ARP 920. Detective Jennifer Katzer (“Katzer”) was assigned to meet with Mr. Groves to see if he wanted to make a statement. 1RP 57. Mr. Groves made clear he did not want to speak without his attorney present. 1RP 57. Because he was going to be moved to the jail,

officers inventoried his property. 1RP 57-58. Katzer discovered an EBT card in Mr. Grove's wallet that was not in his name. 1RP 59. Katzer escorted him to the patrol car for transport and asked him about the EBT card. 1RP 59. That conversation was not recorded on audio. 1RP 60.

At some point, another officer leaned in to the patrol car and turned on the recording equipment. 1RP 60. Mr. Groves was recorded answering police questions and making statements about the events and his arrest. 1RP 61. After a 3.5 hearing, the court issued a written ruling denying admission of the statements made to Katzer: the state had introduced no evidence establishing Mr. Groves intentionally waived his previously asserted Fifth Amendment/Miranda rights. CP 162-63. Katzer did not testify at trial about the suppressed statements.

On September 17, 2014, Mr. Groves, his attorney, and Detective Clasen met for an interview, at Mr. Groves' request. 1RP 75. The interview was recorded and later transcribed. 1RP 79 (Exh. 3). Mr. Groves read a written statement detailing the events that led to the shooting, which he had prepared for the interview. (Exh. 3 p.1-5).

Clasen interviewed Mr. Groves for approximately an hour. (Exh. 3 p. 38). Toward the end of the interview, Clasen said he thought Mr. Groves was guilty of the charged crimes. (Exh. 3 p.38). Clasen then asked Mr. Groves whether his statement was freely and voluntarily given without any promises. (Exh. 3 p. 38). Mr. Groves said, "I don't want to say anything else." (Exh. 3 p.38). Detective Clasen said, "Well, it's not gonna be a valid statement I don't believe." (Exh. 3 p.38).

At a CrR 3.5 hearing, defense counsel argued the statements were inadmissible:

"He [Mr. Groves] is saying that it became clear that the intent of the detective was not to get at the truth of the matter, took very little interest in the information about other suspects, and seemed to be only interested in incriminating evidence against Mr. Groves....Mr. Groves was relying on the state to exercise good faith. When it became clear that they were not practicing in good faith, then that's what invalidates the statement."

1RP 109-110.

The court admitted the statements. In an oral ruling and a written memo, the court found Mr. Groves had requested the

interview, was advised of his *Miranda* rights, defense counsel was present, and Mr. Groves granted permission for the conversation to be recorded. 1 RP 110-11;CP 163. Detective Clasen testified to the statements at trial. 5B 1282-1311.

III. ARGUMENT

A. The State Delayed Producing Exculpatory DNA Evidence In Violation Of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.215 (1963).

To comport with due process, the State has a duty to disclose material exculpatory evidence to the accused and a related duty to preserve such evidence for use by the defense. The failure to do so is a violation of due process, which necessitates the dismissal of criminal charges. *State v. Wittenbarger*, 124 Wn.2d 467, 475, 880 P.2d 517 (1994). Withholding exculpatory evidence raises constitutional fair trial concerns when the evidence, evaluated in the context of the entire record, creates a reasonable doubt about the defendant's guilt that did not otherwise exist. *State v. Bebb*, 108 Wn.2d 515, 522-23, 740 P.2d 829 (1987).

“A defendant need not demonstrate by a preponderance that he would have been acquitted had the evidence been disclosed.” Rather, he must only show the State's “evidentiary suppression

undermines confidence in the outcome of the trial. There is no separate additional prejudice inquiry.” *State v. Davila*, 184 Wn.2d 55, 73, 357 P.3d 636 (2015). *Brady* claims are reviewed de novo. *State v. Mullen*, 171 Wn.2d 881, 893-94, 259 P.3d 158 (2011).

In order to establish a *Brady* violation, a defendant must establish three things: (1) “the evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching”; (2) “that evidence must have been suppressed by the State, either willfully or inadvertently”; and (3) “the evidence must be material.” *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).

“The duty to disclose such evidence is applicable even though there has been no request by the accused.” *Strickler v. Greene*, 527 U.S. at 280. The prosecutor has a duty to learn of any favorable evidence known to others acting on the government’s behalf, including the police. *Id.* at 281.

In this case, the prosecutor failed to disclose material information that was favorable to the defense until Mr. Groves’ speedy trial time had all but expired. In his SAG, Mr. Groves contends that by the October 31 hearing, WSPCL had already determined there was no probative match of DNA from the hammer

of the gun in CODIS, thus prompting the prosecutor to ask for a buccal swab from Mr. Groves. Exh.2 p.2; 1RP 114. As he argued in his SAG, it was only after the lab received his buccal swab that a “match” was declared. SAG 2-8.

Mr. Groves’ DNA profile was in CODIS. 1RP 115-117;174. The DNA that was taken from the hammer of the gun did not match any profile in CODIS. Exh. 2. This information was suppressed within the meaning of Brady because the State did not provide the information to defense counsel until the time for speedy trial was almost expired. If Mr. Groves had known there was no CODIS match, counsel would have been prepared to argue against the taking of the buccal swab, as there would have been no reason for it. The exculpatory nature of the information is evident.

Lastly, the evidence was material. The State had charged Mr. Groves with serious crimes, one of which was unlawful possession of a firearm. The DNA on the hammer was an important part of the State’s case. The failure to disclose that his DNA did not match a CODIS profile until shortly before trial severely impacted Mr. Grove’s opportunity to have the DNA retested without having to waive his speedy trial rights well beyond the time he had already waived.

Defense counsel filed a motion to arrest judgment shortly after the trial. He cited an informal interview of the jurors in which they reported they relied on DNA evidence to reach their verdict. CP 378-381. The prosecutor's failure to disclose the information earlier could have affected the outcome of the trial. Mr. Groves respectfully asks this Court to reverse his convictions. *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

B. The Search At The Ellington Home Was Not Supported By Probable Cause and Counsel Was Ineffective For Failing To Raise The Issue In The Trial Court.

1. The Search Was Unconstitutional Because The Warrant Was Not Supported By Probable Cause.

Where a search warrant is not challenged at the trial court, a reviewing court can consider the issue for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). In order to establish manifest constitutional error authorizing appellate review, the appellant must give a "plausible showing...that the asserted error had practical and identifiable consequences in the trial." *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). Actual prejudice is demonstrated where an adequate record establishes the trial court likely would have

granted a suppression motion. *State v. Contreras*, 92 Wn.App. 307,312, 966 P.2d 915 (1998)(an illegal seizure claim raised for the first time on appeal may be reviewed or the issue may be reached through an ineffective assistance of counsel claim).

Article 1, § 7 guarantees “No person shall be disturbed in his private affairs, or his home invaded, without authority of law. Wash. Const. Art. I, §7. “This constitutional protection is at its apex where invasion of a person’s home is involved.” *State v. Eisfeldt*, 163 Wn.2d 628, 635, 185 P.3d 580 (2008). Similarly, the Fourth Amendment to the U.S. Constitution provides the protection for people in their “persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. Amend. IV.. “Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law.” *State v. Thein*, 138 Wn.2d 133, 147, 977 P.2d 582 (1999)

In his SAG, Mr. Groves argues that the search warrant did not authorize officers to open a locked safe to search for evidence,

and the evidence recovered from that safe was unconstitutionally seized. Under Washington law, a warrant authorizing a search of the premises justifies a search of the personal effects of the owner found in that place, which are plausible repositories for the objects specified in the warrant. *State v. Worth*, 37 Wn.App. 889, 892, 683 P.2d 622 (1984). However, here, the alleged error is the facts in the affidavit are insufficient to show probable cause to search any of the residence at 2407 Ellington Street, rendering the search unconstitutional.

A search warrant should be issued only if the affidavit demonstrates probable cause that the defendant is involved in criminal activity and that evidence of that criminal activity will be found *in the place to be searched*. *Thein*, 138 Wn.2d at 140 (internal citation omitted)(emphasis added). Probable cause is a fact-based determination requiring more than a hunch or mere suspicion. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.2d 177 (2008).

The appellate court is limited to the “four corners” of the affidavit supporting probable cause and it reviews the trial court’s assessment of probable cause de novo. *State v. Chamberlain* 161 Wn.2d 30, 40, 162 P.3d 389 (2007). The affidavit of probable cause

should be reviewed in a commonsense, rather than a hyper-technical manner. *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). However, it must set out the facts and circumstances sufficient to establish a reasonable inference that evidence of the crime can be found at the place to be searched. *Thein*, 138 Wn.2d at 140.

Here, the facts contained in the “four corners” of the search warrant affidavit detail a reported weapons complaint at apartment # 243 at 2102 N. Walnut Street. Exh. 503. It contained witness statements about events and descriptions of individuals and vehicles allegedly involved in the events. Exh. 503. After the descriptions, the affidavit provided the following:

On June 14, 2014, Officer Caillier attempted to contact Groves at 2407 Ellington St, referenced (sic) an arrest warrant for Groves. Officer Caillier states in his report that he knocked on the door and Groves answered the door. Exh. 503 p.4.

Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law. *Thein*, 138 Wn.2d at 147. Merely alleging a “fact”, that is, that Mr. Groves answered the door at that address a month earlier, is insufficient to establish the requisite nexus. The search warrant

affidavit contains no facts that connect that address to evidence of criminal activity. For example, the affidavit does not mention whether that address is listed as Mr. Groves' residence on his driver's license; or whether officers did any reconnoitering to determine who owned or rented the residence. The facts, as available to the magistrate, did not justify a reasonable belief that evidence of a crime would be found at that address. The trial court could have properly granted a motion to suppress.

2. Mr. Groves was denied his constitutional right to effective assistance of counsel when counsel failed to pursue a motion to suppress evidence seized pursuant to a search warrant issued without probable cause.

Effective assistance of counsel is guaranteed by both U.S. Const. amend. VI and Wash. Const. art. 1, §22 (Amend. 10). *State v. Mierz*, 17 Wn.2d 460, 471, 901 P.2d 286 (1995). The Court has established a two-part test for ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the defendant must show a deficient performance. The appellate court presumes a defendant was properly represented, but this presumption can be overcome when there is no conceivable legitimate tactic or strategy explaining

counsel's performance. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

To establish prejudice, the defendant must also show counsel's errors were so serious as to deprive him of a fair trial, whose result is unreliable. *Strickland*, 466 U.S. at 687. What is necessary is a probability sufficient to undermine the confidence in the outcome of the trial, not that counsel's deficient conduct more likely than not altered the outcome of the trial. *Strickland*, 466 U.S. at 693-94.

The failure to bring a plausible motion to suppress is deemed ineffective assistance of counsel if it appears the motion would likely have been successful. *State v. Meckelson*, 133 Wn.App. 431, 436, 135 P.3d 991 (2006). The appellate record must be adequate for this Court to evaluate the constitutional challenge to the search. *State v. Walters*, 162 Wn.App. 74, 80, 255 P.3d 835 (2011). Here the record is adequate.

The affidavit describes a residence where Mr. Groves answered the door a month earlier. As described above, the affidavit fails to provide any further information currently linking Mr. Groves with that residence. Probable cause for the warrant on 2407 Ellington did not exist and the evidence would have been

suppressed. There is no legitimate trial strategy or tactics that would justify the failure to pursue the motion to suppress.

Reichenbach, 153 Wn.2d at 130-31.

C. Mr. Groves Did Not Knowingly, Voluntarily, and Intelligently Waive His Privilege Against Self-Incrimination.

Mr. Groves was provided opportunity to make a statement at two different points in time. The first time, shortly after he was arrested, Mr. Groves asserted his right to an attorney and remained silent. The officer involved in the arrest re-engaged with Mr. Groves within minutes after he asserted his rights and had a conversation with him about the alleged crime.

The admissibility of statements obtained after a person in custody has decided to remain silent depends under Miranda on whether his “right to cut off questioning” was “scrupulously honored.” *State v. Vannoy*, 25 Wn.App. 464, 469, 610 P.2d 380 (1980). If questioning continues, without the presence of an attorney and a statement is taken, “a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.” *Miranda v. Arizona*, 384 U.S. 436,474-75, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Here, the detective did not scrupulously honor Mr. Groves' assertion of his rights. The trial court listened to the recording of the statements. The court noted that rather than re-advising Mr. Groves of his right to remain silent, and clarifying whether he wanted to waive his Miranda rights, the detective engaged in dialog about the alleged crime. The conversation was not clearly recorded and the contents of it were not fully developed during testimony. The court concluded it could not infer a waiver of rights by virtue of the statements being made and there was no evidence the detective ever tried to clarify whether Mr. Groves intended to waive his previously asserted rights. The trial court properly suppressed all statements he made to Detective Katzer. CP 162-63.

The second statement, given to Detective Clasen was admitted at trial. For a defendant's statement to be admitted into evidence, it must pass two tests of voluntariness. The first is a due process test and the second is the voluntary waiver of Miranda rights. *State v. Vannoy*, 25 Wn.App. at 467. The due process test of voluntariness is "whether the behavior of the law enforcement officials was such as to overbear petitioner's will to resist" and "to bring about confessions not freely self-determined." *Vannoy*, 25

Wn.App. at 467. Mr. Groves does not assert that his will was overcome by mental or physical coercion of the detective. Rather, he argues that he did not waive his rights with a full awareness of the consequences of his decision.

The waiver of a constitutional right must be knowing, voluntary and intelligent. *State v. Humphries*, 181 Wn.2d 708, 717-18, 336 P.3d 1121 (2014). To be knowing and intelligent, a waiver must be “made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” *State v. Mayer*, 184 Wn.2d 548, 362 P.3d 745 (2015).

Mr. Groves was advised of his Miranda rights, he requested the interview, and his attorney was present during the questioning. (Exh. 3 p.2). In good faith, he gave a statement. He was surprised and alarmed when he realized the officer had already made up his mind that Mr. Groves was guilty as charged and would only use his statements to incriminate him, not exonerate him. Exh. 3 p.37-38.

The officer ended the interview by asking Mr. Groves if his statement was given freely and voluntarily without promises. Exh. 3 p.38. Mr. Groves declined to answer. He could not and did not agree that his statement was freely and voluntarily given: he had

only just become aware of the potential consequences of giving a statement.

In *Humphries*, the defendant was told that his signature on a stipulation to an element of the crime was not required. The stipulation was read to the jury as part of the State's case. Humphries did not sign the stipulation until the State presented its case. On review, the Court held, "Without something in the record suggesting that he (Humphries) voluntarily changed his mind, the signature cannot be considered a knowing, intelligent, and voluntary waiver of his constitutional rights. Even though a waiver of a constitutional right may be informed by strategic decisions, it cannot be involuntary. *Humphries*, 181 Wn.2d at 718.

Like *Humphries*, Mr. Groves originally agreed to waive his rights for strategic reasons. He wanted to and expected that he was providing information that substantiated his innocence. However, he waived his right without understanding the consequences, making it a waiver that was not knowingly and intelligently made. His statement should have been suppressed.

IV. CONCLUSION

Based on the foregoing facts and authorities, and Mr. Groves' opening brief and SAG, respectfully asks this Court to reverse his convictions for insufficiency of the evidence, remand for suppression of evidence, and a new trial on the remaining convictions.

Respectfully submitted,

Marie Trombley

WSBA 41410
PO Box 829
Graham, WA 98338
253-445-7920
marietrombley@comcast.net

CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Joel Groves do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, of appellant's second supplemental brief was sent by first class mail, postage prepaid on October 11, 2016, to:

Joel Groves, DOC# 908678
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

and email, per prior agreement between the parties to:

EMAIL: prosecutor@co.kittitas.wa.us
Kittitas County Prosecuting Attorney Office

Marie Trombley

WSBA 41410
PO Box 829
Graham, WA 98338
253-445-7920
marietrombley@comcast.net